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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

RAY H. THARP and ROBERT C. MORCK,

Petitioners,

v.

IOWA DEPARTMENT OF CORRECTIONS AND STATE OF IOWA,

Respondents.

Petition For Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to review the Eighth Circuit's decision that the plaintiffs in a Title VII action must demonstrate as part of their prima facie case that an explicit gender employment restriction, which is not part of an affirmative action plan, meet a threshold balancing test requiring that the deprivation be something more than a "minimal restriction" in the absence of the defendant employer showing that the restriction is a "bona fide occupational qualification."

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Petitioners, Ray H. Tharp and Robert C. Morck, respectfully pray that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered on October 13, 1995, and the subsequent denial of the Motion for Rehearing on November 15, 1995.

OPINIONS BELOW

The United States District Court for the Southern District of Iowa granted summary judgment for Respondents (and denied Petitioners' cross motion for summary judgment), concluding that the gender restriction requiring female only Residential Advisors (RAs) in the women's unit of the Fort Des Moines Residential Facility (Facility), used to deny Plaintiffs' (male RAs) requested shift assignments, were minimal restrictions which did not deprive Plaintiffs of employment opportunities within the meaning of Title VII (App. p. 14). On October 13, 1995, the Eighth Circuit Court of Appeals affirmed that decision and held that the Plaintiffs failed to prove a prima facie case because the preferred shift assignments visited only "minimal restrictions" on male employees when balanced against the legitimate privacy interest of female inmates and the Defendants were not required to establish that the restriction was a B.F.O.Q. (App. pp. 4, 7) The Eighth Circuit denied Petitioners' Motion for Rehearing on November 15, 1995. (App. p. 17) *Tharp v. Iowa Dept. of Corrections*, 68 F.3d 223 (8th Cir. 1995).

JURISDICTION

Judgment of the Eighth Circuit Court of Appeals was entered on October 13, 1995, and rehearing denied on November 15, 1995. This Court's jurisdiction to consider this petition from the final judgment of a United States Court of Appeals is pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire, to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . .

42 U.S. § 2000e-2(e):

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his . . . sex . . . in those certain instances where . . . sex . . . is a bone fide occupational qualification reasonably necessary to

> the normal operation of that particular business or enterprise . . .

STATEMENT OF THE CASE

The Petitioners were residential advisors (RAs) at the Fort Des Moines Residential Facility, a minimum security correctional facility located in Des Moines, Iowa. The facility, at the time relevant to this case, was divided into three units:

> (1) one historically housing between 40 and 45 male OWI offenders;
>
> (2) one historically housing between 18 and 25 female offenders; and
>
> (3) one historically housing between 60 and 65 male offenders not part of the OWI program. (App. pp. 18-19)

RAs perform a number of functions at the facility and both male and female RAs were historically allowed by the facility to work in both same sex and opposite sex units. (App. p. 19) Male RAs were allowed to perform all normal functions in the all-womens' units with the exception of three functions considered too invasive. The three exceptions were "face to face" urinalysis, pat-downs, and strip searches, which required the facility to arrange for RAs of the same gender. (App. p. 19)

On or about November 25, 1987, the facility issued a memorandum to the RA's advising them of certain scheduling changes, including a policy that only female RAs would be allowed to work in the women's unit. (App. pp. 19, 24-27)

The Petitioners, who ranked first and second in terms of seniority at the facility, bid on three shifts, but the facility refused to consider the Petitioners for these shifts because they were men. A less senior, female RA was given the shift instead. (App. p. 21)

After the institution of the policy that the women's unit be staffed with only female RAs, the respondents (1) administratively assigned male RAs to the unit to cover the female RA's days off; (2) the all male OWI unit was periodically staffed by a single individual of either sex; and (3) when temporarily staffed by an opposite sex RA, the facility arranged to have same sex RAs or staff members perform the more invasive procedures as had been the case prior to the adoption of the new same sex policy. (App. p. 22)

The parties filed cross motions for summary judgment based on a stipulated Statement of Undisputed Facts. The District Court granted Respondents' motion (and denied Petitioners') on grounds that the denial of shift assignments did not deprive the Plaintiffs of employment opportunities in the form of demotion of status or reduction of pay. According to other District Court, the favorable shift assignments, however desirable and valuable to the employee, were "minimal restrictions" when balanced against the privacy rights of female inmates and Respondents did not have to show these restrictions were bona fide occupational qualifications (B.F.O.Q.). (App. p. 14)

Upon appeal to the Eighth Circuit Court of Appeals, that Court affirmed, holding that Justice Steven's concurring opinion in *Johnson v. Transportation Agency,* 480 U.S.

616 (1987) (addressing the constitutionality of an affirmative action plan) and the Eighth Circuit case of *Timm v. Gunter,* 917 F.2d 1093 (8th Cir. 1990), *cert denied* 501 U.S. 1209 (1991) supported the proposition that gender based staffing restrictions are minimal and do not deprive the employee of any employment opportunities. (App. pp. 7-8) *Tharp v. Iowa Dept. of Corerctions,* 68 F.3d 223, 225-26 (8th Cir. 1995).

REASONS FOR GRANTING THE WRIT

It is respectfully contended that the Eighth Circuit Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court and Courts of Appeal in other circuits.

Here, the Petitioners produced direct evidence, including the undisputed admissions of Respondents, that sex was the motivating factor in their decision to refuse the Petitioners' applications for favorable shift assignments. (App. p. 21) *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). A prima facie case of sex discrimination is established *per se* if the employer admits that sex is the criterion used in job selection. *International Union, UAW v. Johnson Controls,* 499 U.S. 187 (1991). Under these circumstances the employer has the burden to establish the affirmative defense that the sex based criterion is a bona fide occupational qualification (B.F.O.Q.). *Dothard v. Rawlinson,* 433 U.S. 321, 322 (1977); *Gifford v. Atchison, T. & S.F. Ry. Co.,* 685 F.2d 1149 (9th Circ. 1982).

The Respondents' took the position below that this sex based restriction did not violate Title VII because it

was a B.F.O.Q. Neither the District Court nor the Eighth Circuit reached the B.F.O.Q. issue, however, and for good reason. The stipulated factual history demonstrates conclusively that the Respondents could not possibly carry their heavy burden of proving this "extremely narrow" exception to prohibited gender based discrimination under Title VII. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); and *Weeks v. Southern Bell Telephone and Telegraph*, 408 F.2d 228 (5th Cir. 1969). An employer can rely on the B.F.O.Q. exception only if it can prove that:

(1) it had reasonable cause to believe, on a factual basis, that all or substantially all men would be unable to perform safely and efficiently the duties of the RA position in the all-women's unit;

(2) the very essence of the operation of the facility would be undermined by not allowing women to staff the all-women's unit exclusively;

(3) the failure to allow men to bid on the shifts in the all-women's unit was based on actual sexual characteristics rather than upon stereotyped assumptions; and

(4) there was no other less restrictive alternative available to the defendants which could have avoided the sex classification.

See *Dothard, supra.;* and *E.E.O.C. v. Boeing Co.*, 842 F.2d 1213, 1214 (9th Cir.) *cert denied* 488 U.S. 889 (1988); *Harless v. Duck*, 618 F.2d 611, 616, n.6 (6th Cir. 1980).

As the Statement of Undisputed Facts demonstrates, the Respondents (1) historically employed male RAs in the women's unit and accommodated inmate privacy by

having same sex RAs perform face to face urinalysis, pat downs, and strip searches; (2) historically rearranged job responsibilities or accommodated female RAs in the all-male OWI unit; and (3) at times subsequent to the institution of the policy that only women staff the all-women's unit, employed men to fill in on the female RA's days off, indicating it was not necessary to employ women only in the all-womens' unit. (App. pp. 19, 21-22)

No other courts have used the "minimal restrictions" balancing criteria employed by the Eighth Circuit to defeat a Title VII claim without requiring the employer to prove a B.F.O.Q. See, *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991); *Torres v. Wis. Dept. of Health & Social Servs.*, 859 F.2d 1523, 1528 (7th Cir. 1988); *Griffin v. Michigan Dept. of Corrections*, 654 F.Supp. 690 (E.D. Mich. 1982); *Garrett v. Oskaloosa County*, 734 F.2d 621 (11th Cir. 1984); *Edwards v. Department of Corrections*, and 615 F.Supp. 804 (M.D. Ala. 1985).

Instead, both District and Circuit Courts have uniformly held that a defendant prison must demonstrate why it cannot reasonably rearrange job responsibilities within the prison in order to minimize the clash between the privacy interests of inmates on the one hand and the non-discrimination requirements of Title VII on the other before the prison will be entitled to the B.F.O.Q. exception. *United States v. Gregory*, 818 F.2d 1114, 1118 (4th Cir.) *cert denied*, 484 U.S. 847 (1987); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir.) *cert denied*, 446 U.S. 966 (1980); *Jordan v. Gardner*, 986 F.2d 1521, 1527 (9th Cir. 1993); and *Smith v. Fairman, et al.*, 678 F.2d 52 (7th Cir. 1982).

In *Carl v. Angelone,* 883 F.Supp. 1433 (D. Nev. 1995) the District Court held that Plaintiffs had established a prima facie Title VII case by showing that assignment transfers of correctional officers was based on gender. Consequently, the Court held that the Director of Prisons had the burden of proving a B.F.O.Q. because of prisoner privacy rights. The Court in *Carl* balanced the prisoners privacy interests against the correctional officers equal employment protections and found that there is no *per se* rule forbidding male officers from conducting searches of female prisoners. *Id.* at 1440. See, also, *Smith v. Fairman,* 678 F.2d 52 (7th Cir. 1982); and *Johnson v. Phelan,* 69 F.3d 144 (7th Cir. 1995).

Moreover, this Court's decision in *Johnson v. Transportation Agency,* 480 U.S. 616 (1987) does *not* lend support to the Eighth Circuit's effort to add a new balancing element to the Plaintiff's prima facie burden in a Title VII discrimination case. The *Johnson* case addressed the legitimacy of a voluntary affirmative action plan for women under Title VII when there is a manifest imbalance in traditionally segregated job categories. *Id.* at 631. See *Quivin v. City of Pittsburgh,* 801 F.Supp. 1486 (W.D. Pa. 1992); *Davis v. Halpren,* 768 F.Supp. 968 (E.D.N.W. 1991); and *Ruton v. Republican Party of Ill.,* 497 U.S. 62, 73 n.6 (1990). See, also, *Smith v. Virginia Commonwealth University,* 856 F.Supp. 1088, 1091 (E.D. Va. 1994). The Court approved the affirmative action program relying on statistical evidence produced by the Defendant employer that the percentage of women in the employer's workforce was significantly less than the percentage in the relevant labor market.

Unlike *Johnson,* Respondents have never claimed, and the undisputed facts do not support, that this policy was

part of a voluntary affirmative action proposal. Rather, Respondents' claim the affirmative defense of B.F.O.Q., which this Court did not address in *Johnson v. Transportation Agency, supra.* The Eighth Circuit is attempting to take the balancing portion of this Court's approach to affirmative action proposals and misapply that concept by making it part of Plaintiff's prima facie burden in a non-affirmative action case and regardless of whether the employer can establish B.F.O.Q. as an affirmative defense.

CONCLUSION

For all the reasons stated, Petitioners Ray H. Tharp and Robert Morck, pray that this Court grant a Writ of Certiorari to review the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3992

Ray H. Tharp; Robert B. Morck,	*	
Plaintiffs - Appellants,	*	Appeal from the United States District Court for the Southern District of Iowa.
v.	*	
Iowa Department of Corrections; State of Iowa,	*	
Defendants - Appellees.	*	

Submitted: June 14, 1995

Filed: October 13, 1995

Before McMILLIAN and LOKEN, Circuit Judges, and VAN SICKLE,* District Judge.

LOKEN, Circuit Judge.

The Iowa Department of Corrections ("IDC") instituted shift changes so that only female Residential Advisors ("RAs") would staff the women's unit of a mixed-gender minimum security prison. Two male RAs, Ray H.

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* The HONORABLE BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

Tharp and Robert B. Morck, filed this action alleging that the gender-based shift assignments violate Title VII and the Iowa Civil Rights Act. The district court[1] granted summary judgment for IDC because plaintiffs were not harmed by this minimal restriction. Plaintiffs appeal. We affirm.

I.

The Fort Des Moines Residential Facility (the "Facility") is a minimum security prison housing "OWI" offenders, inmates on probation, and parole violators. The Facility consists of three residential units, an OWI unit and a men's unit, which house only male inmates, and a women's unit. RAs are the Facility's security staff. Among other duties, they conduct room searches, urinalysis tests, and strip and pat-down searches of residents and visitors. Personal searches are frequent at the Facility, because the inmates have substantial outside contacts and many have a history of substance abuse. The Facility requires that RAs of the same sex conduct "face-to-face" urinalyses and personal searches; plaintiffs do not challenge that policy.

The shift changes in question were implemented on November 25, 1987. At that time, the Facility employed eleven male and six female RAs. Under the prior shift assignment policy, at times no female RA was available to conduct same-sex searches or urinalyses of female residents in the women's unit. Other, less trained female staff

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[1] The HONORABLE RONALD E. LONGSTAFF, United States District Judge for the Southern District of Iowa.

would then perform these functions. To remedy this problem, and to provide more positive role models for the female inmates, the Facility adopted the policy that only female RAs would be assigned to the women's unit. Under this new policy, there were four shifts open only to female RAs and twelve shifts open to both male and female RAs.

Plaintiffs Tharp and Morck were the two RAs with the greatest job seniority. After the policy change, they bid on women's unit shifts, but the assignments went to women RAs with less seniority. Plaintiffs' union then filed a grievance. The Fifth Judicial District Department of Correctional Services denied the grievance on the ground that "the practice of requiring a woman staff to be directly assigned to a women's unit is accepted practice. . . . The issue is one of operational efficiency."

Morck was promoted to probation and parole officer in May 1989. Tharp was promoted to probation and parole officer in November 1992. Though the RA shift assignment issue no longer affected their work, plaintiffs filed this action in April 1993, alleging that they were denied assignment to more desirable, female-only shifts to which they were entitled by reason of their seniority, and seeking damages because the November 1987 scheduling policy discriminated against them on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Iowa Civil Rights Act, Iowa Code § 216.

The district court granted summary judgment to IDC. Because the shift assignment policy was adopted to meet legitimate penological concerns, and because plaintiffs

had many different shift assignments and promotions available to them, the court concluded that the policy is a minimal restriction that "did not deprive [plaintiffs] of employment opportunities or otherwise adversely affect their employment status."[2]

II.

On appeal, plaintiffs argue they were denied preferred shift assignments because of a gender-based change in policy, and that proves a violation of Title VII and the Iowa Civil Rights Act unless IDC can prove that the policy is a bona fide occupational qualification, an issue not appropriate for summary judgment.[3] We disagree.

A job assignment issue of this type impacts the prison employer's penological interests, the prison employees' employment interests, and the prison

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[2] The court noted that plaintiffs' claim would also be subject to a Title VII affirmative defense if assigning female RAs to the women's unit is a "bona fide occupational qualification." *See* 42 U.S.C. § 2000e-2(e). In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Supreme Court held that being male was a b.f.o.q. for the job of correctional counselor at an Alabama male maximum-security penitentiary. Justice Marshall dissented from the decision to exclude women from these jobs but commented, "it may well be possible, once a constitutionally adequate staff is available, to rearrange work assignments so that legitimate inmate privacy concerns are respected without denying jobs to women." 433 U.S. at 347. Like the district court, we do not reach the b.f.o.q. issue.

[3] Plaintiffs accept the district court's conclusion that the analysis under the Iowa Civil Rights Act is the same as that under Title VII. *See King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 598, 601 (Iowa 1983).

inmates, privacy interests. The language of Title VII suggests that the congressional policy against gender-based discrimination in employment may not be balanced against these other, often-competing interests, absent proof of the b.f.o.q. defense. The statute provides that an employer may not

> discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment [or] classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status.

42 U.S.C. § 2000e-2(a).

However, in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), a divided Supreme Court reaffirmed that, despite the statute's seemingly blanket prohibition, an affirmative action plan adopted by a public employer to remedy a manifest imbalance in traditionally segregated job categories will be upheld, without the necessity of a b.f.o.q. analysis, if it "visits minimal intrusion on the legitimate expectations of other employees." *Id.* at 640. Justice Stevens, concurring, expressed the view that this principle is not limited to affirmative action plans; that is, *Johnson* "does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups." *Id.* at 642. Justice O'Connor, also concurring separately, opined that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Id.* at 649.

This court applied a similar balancing analysis to prison job assignment issues in *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990), *cert. denied*, 501 U.S. 1209 (1991). In *Timm*, prisoners at an all-male prison challenged, as violative of their Eighth Amendment privacy rights, prison policies that allowed female guards to conduct pat searches and to view inmates in the showers. Applying the deferential balancing test of *Turner v. Safely*, 482 U.S. 78, 88-91 (1987), we rejected these § 1983 claims, deferring to the prison administrators' professional judgment that the practices at issue were essential to prison security, involved minimal or at least tolerable intrusions on the male inmates' privacy, and could not be eliminated without trampling female guards' employment opportunities or incurring unreasonable costs. 917 F.2d at 1099-1102. *Accord Grummett v. Rushen*, 779 F.2d 491, 492 (9th Cir. 1985); *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983).

Though *Timm* was primarily an inmate § 1983 case, the female prison guards filed a counterclaim alleging that a policy requiring that only male guards work in the highest security unit (Unit 5) violated Title VII. We held that "the Unit 5 staffing restriction does not violate Title VII" because "a minimal restriction such as the Unit 5 gender-based staffing restriction does not deprive female employees of any employment opportunities." 917 F.2d at 1102 n.13.

The policy of assigning female RAs to the Facility's women's unit addresses female inmate privacy concerns, improves the Facility's rehabilitative services to female inmates, *and* advances the interests of female employees. Although the five opinions in *Johnson* expressed widely

divergent Title VII views, we believe that a majority of the Court in *Johnson* approved the Title VII balancing analysis we conducted in *Timm v. Gunter* – that is, a prison employer's reasonable gender-based job assignment policy, particularly a policy that is favorable to the protected class of women employees, will be upheld if it imposes only a "minimal restriction" on other employees.[4]

Applying the balancing analysis of *Johnson* and *Timm*, we conclude after *de novo* review of the parties' Statement of Undisputed Facts that the district court properly granted summary judgment to IDC in this case. There is no question that IDC implemented the policy to further legitimate penological and privacy concerns. On the other side of the balance scale, even if the RAs' shift assignments are a "privilege[] of employment" within the meaning of 42 U.S.C. § 2000e-2(a), the undisputed facts demonstrate that the policy of same-sex assignments to the Facility's women's unit was a "minimal restriction" on plaintiffs' employment. Plaintiffs concede that they did not suffer termination, demotion, or reduction of pay. Their promotion opportunities were unaffected, and they

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[4] In the pre-*Johnson* case of *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1087 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980), we held that a policy forbidding promotion of women to the "Correctional Officer II" classification violated Title VII but noted that the statute would permit a "proper classification narrowly drawn" to protect inmates' privacy through same-sex job assignments. Though *Gunther* limited this balancing analysis to the b.f.o.q. defense, *Johnson* and *Timm* teach that a minimal restriction promoting penological interests, inmate privacy, *and* the employment opportunities of a protected class does not violate Title VII.

were both later promoted to parole and probation officer positions. Thus, unlike the denial of promotions in *Gunther,* the Facility's scheduling policy did not reduce the male RAs' pay or promotion opportunities. Instead, the Facility furthered the female inmates' privacy and rehabilitation interests by reassigning RAs in a manner even *less* restrictive than that upheld in *Timm.* From the standpoint of impact on plaintiffs, this case is very much like *Harlston v. McDonnell Douglas Corp.,* 37 F.3d 379, 382 (8th Cir. 1994), where we affirmed summary judgment dismissing plaintiff's Title VII claim because plaintiff's reassignment to a different secretarial position was not an adverse employment action even though the new position involved "fewer secretarial duties and was more stressful in that she had to watch the door, listen for the fax, and be in charge of security for people coming in and out of the area."

In addition, we note that plaintiffs have not established they had a right to shift assignments of their choice. In essence, they claim the collective bargaining agreement granted them Facility-wide job seniority that governed shift assignments. However, the adverse grievance decision is strong, unrefuted evidence to the contrary. Although the absence of a right to a particular job assignment would not excuse employer gender discrimination in other contexts, it confirms that we deal here with a minimal restriction. If plaintiffs' union believes that IDC has given too much weight to concerns of inmate privacy and rehabilitation, or to the employment opportunities of female RAs, these issues presumably remain mandatory subjects of future collective bargaining.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RAY H. THARP and ROBERT B. MORCK, Plaintiffs,	)	CIVIL NO. 4-93-10249
vs.	)	ORDER
IOWA DEPARTMENT OF CORRECTIONS and STATE OF IOWA, Defendants.	)	(Filed Nov. 1, 1994)

The Court has before it the parties, cross motions for summary judgment; Plaintiffs' having been filed on May 23, 1994 and defendants' on May 24, 1994.

I. BACKGROUND

The joint statement of undisputed facts made by the parties is adopted and incorporated herein. Only part of the undisputed facts are restated.

Plaintiffs, Ray H. Tharp and Robert B. Morck, were employed by the defendants as male residential advisors at the Fort Des Moines Residential Facility (the Facility) in Des Moines, Iowa. In 1987 the facility had three parts: an OWI unit, a men's unit and a women's unit. On November 25, 1987 the Facility issued a memorandum to Residential Advisors (RAs) regarding schedule changes which required that only female RAs would work the women's unit. The Facility's policy required that an RA

conducting a "face to face" urinalysis, pat-downs, or strip search be the same sex as the resident.

Both plaintiffs bid on the women unit shifts but were denied because they were not women. A less senior woman was given the shift. Shortly after the schedule change, two men were assigned to the women's unit to cover female staff member's days off. The all male OWI unit was sometimes staffed by one woman, and at those times the "same sex" duties were performed by a staff member from another unit.

Both plaintiffs had the opportunity to bid on various other shift openings at the Facility. From the time the new schedule went into effect, Tharp had the opportunity to bid on 36 shift openings for various hours and days. Tharp had the opportunity to transfer to 11 probation and parole openings which would have been a promotion under the union contract. In November, 1992, Tharp transferred to a probation and parole position and no longer works at the Facility. In May, 1989, Morck transferred to a probation and parole officer position. Prior to his transfer Morck would have been able to bid on eight different shift openings at varying hours and had the opportunity to transfer to probation and parole position on four different occasions.

Plaintiffs do not assert they received a reduction in pay or status as a result of the scheduling change. Instead, plaintiffs assert that because of the female RA requirement for the women's shift "male residential advisors, including the [p]laintiffs, were required to work less desirable shifts than female advisors, irrespective of their seniority and/or qualifications." (Plaintiffs' Complaint at

3). Plaintiffs maintain the defendants have discriminated against them on the basis of sex under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and the Iowa Civil Rights Act, Iowa Code § 216, formerly Iowa Code § 601A. Defendants assert that assigning one shift to females only does not violate either Title VII or Iowa Code § 216. Defendants contend that no difference in pay, rank, promotions or job duties existed between male and female RAs and that there was merely a "functional assignment" of certain shifts and that no unlawful employment practices occurred. Alternatively, the defendants argue that even if the Court finds a prima facie case of discrimination, the defendants have demonstrated a bona fide occupational qualification ("BFOQ") for the November 25, 1987 memorandum.

II. ANALYSIS

Summary judgment is properly granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party must establish its right to judgment with such clarity that there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). In the present case, the parties have filed a joint statement of undisputed facts which provides an adequate record for addressing their claims.

A. Plaintiffs' Claims Under Title VII

42 U.S.C. § 2000e-2(a)(2) provides that

> It shall be an unlawful employment practice for an employer – (2) to limit, segregate, or classify

> his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. Rather than focusing on a *McDonald-Douglas* analysis, the Court will address the issue of whether, in the context of this case, plaintiffs have been deprived of an employment opportunity or otherwise had their employment status adversely affected.

As justifications for the November 25, 1987 memorandum defendants assert security concerns, rehabilitation goals, privacy of the Facility's residents, and necessity for the Facility's normal operation. In examining a Title VII claim within the prison framework the Court must balance the plaintiffs, Title VII rights against rights of the prisoners and the possibility of disruption of the prison system. *See Gunther,* 612 F.2d at 1086; *Timm v. Gunther,* 917 F.2d 1093, 1099 (8th Cir. 1990), *cert denied,* 501 U.S. 1209 (1991). These competing concerns were addressed in *Timm.* "[W]hile inmates may lose many freedoms at the prison gate, they retain at least some of their constitutional rights while confined." *Timm,* 917 F.2d at 1099 (citing *Turner v. Safely,* 482 U.S. 78, 84 (1987)); *Hudson v. Palmer,* 468 U.S. 517, 523 (1984)). Prisoners maintain rights not inconsistent with imprisonment or objectives of incarceration, but prisoners' rights may be limited significantly to further the penal system's legitimate objectives. *Timm,* 917 F.2d at 1099 (citations omitted). On the other hand, the court recognized that prison administrators are

given great deference in striking a balance between prisoners' rights and the demands of institutional security. *Id.* at 1099. "Such a balancing act is an exceedingly complex task, and not one easily undertaken by courts, whose expertise in the imperatives of institutional security is slight and in no way approaches that of the professional administrators charged with the awesome task of running our prisons." *Id.*

While finding that gender was not a bona fide occupational qualification for staff positions at the Nebraska State Penitentiary, the Eighth Circuit upheld the gender restriction, requiring male guards only, for a maximum security unit of the prison. *Timm,* 917 F.2d at 1102 n.13. The Eighth Circuit approved the district court's finding that "a minimal restriction such as the Unit 5 gender-based staffing restriction does not deprive female employees of any employment opportunities." *Id.*

Similarly, in the present case, defendants' November 25, 1987 memorandum requiring only a female RA to be scheduled for the women's side is a minimal restriction. The Court finds the defendants, memorandum resulted in an assignment of duties within the Facility to uphold the Facility's legitimate policies and concerns. No evidence exists in the record that the plaintiffs were deprived of any employment opportunities, were demoted in status, or received any reduction in pay. Instead, the alleged harm to the plaintiffs is that they were denied favorable shift assignments. In light of the Facility's needs to accommodate inmate privacy, along with the other numerous openings that were available to plaintiffs for different shift assignments and promotions, the Court finds that the shift requirement established by the

November 25, 1987 memorandum did not deprive of employment opportunities or otherwise adversely affect their employment status. *See* 42 U.S.C. § 2000e-2(a)(2), *supra*.[1] Plaintiffs have failed to establish their Title VII claims and summary judgment must be granted for the defendants.[2]

B. Plaintiffs' Claims under Iowa Code § 216 (Formerly Iowa Code § 601A)

The Court reaches the same result with the plaintiffs' claims under Iowa Code § 216 as was reached with the

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[1] The present case differs from *Gunther v. Iowa State Men's Reformatory*. In *Gunther* the court found the prison's classification was not a permissible bfoq and the effect of the classification was to prohibit advancement in a person's chosen field because that person was a woman. 612 F.2d at 1087. By contrast, in the present case the scheduling requirement that a female guard work on the woman's side did not affect the plaintiffs' compensation, status or ability to receive promotions.

[2] The Eighth Circuit, without actually deciding the question, noted that under some circumstances an employer may be able to create a bfoq for some job functions to ensure inmate privacy. *Gunther*, 612 F.2d at 1087. Other courts have upheld a gender requirement as a bona fide occupational qualification in a prison setting. *See, e.g., Carey v. New York State Human Rights App. Bd.*, 61 A.D.2d 804, 402 N.Y.S.2d 207 (gender was a bona fide occupational qualification for a corrections officer because female inmates had a right to privacy in baths or showers, medical examination and treatment and this would be undermined by employing a male to guard and observe female inmates) *aff'd*, 390 N.E. 2d 301, 416 N.Y.S.2d 794 (1979). Because the Court determines that the November 25, 1987 memorandum was a minimal restriction and that plaintiffs have failed to establish their sex discrimination claims under Title VII, the Court does not address the issue of whether the defendants have asserted a valid bona fide occupational qualification.

plaintiffs' claims under Title VII. *See Boelman v. Manson State Bank*, No. 93-675, 1994 WL 51586 (Iowa Sept. 21, 1994), at *4 ("Iowa Supreme Court has looked to federal cases interpreting Title VII for guidance in applying Chapter 601A"); *King v. Iowa Civil Rights Commission*, 334 N.W. 2d 598, 601 (Iowa 1983).

III. CONCLUSION

Based on the foregoing discussion, the plaintiffs' motion for summary judgment is **denied** and defendants' motion for summary judgment is **granted.**

IT IS SO ORDERED.

Dated this 1st day of November, 1994.

/s/ Ronald E. Longstaff
RONALD E. LONGSTAFF,
JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3992SIDM

Ray H. Tharp; Robert B. Morck,	*	
Appellants,	*	Appeal from the United States District Court for the Southern District of Iowa
vs.	*	
Iowa Department of Corrections; Iowa, State of,	*	
Appellees.	*	

The petition for rehearing filed by the appellants has been considered by the court and is denied.

November 15, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RAY H. THARP and **ROBERT B. MORCK,** Plaintiffs, vs. **IOWA DEPARTMENT OF CORRECTIONS** and **STATE OF IOWA,** Defendants.	Case No. 4:93-CV-10249 **STATEMENT OF UNDISPUTED FACTS** (Filed May 24, 1994)

COME NOW the parties, through counsel, and pursuant to Federal Rule of Civil Procedure 54 and Local Rule 14(h) they submit the following joint Statement of Undisputed Facts:

1. The Fort Des Moines Residential Facility is a minimum security residential facility operated by the Fifth Judicial District Department of Corrections. It houses people who are there as a condition of probation, OWI offenders who are inmates of the State, inmates who are on probation from a federal court, and parole violators on federal sentences. The facility also serves as a halfway house for inmates coming out of federal prisons.

2. In 1987, the facility housed 18 women and approximately 105 men, and was divided into three parts: (1) an OWI unit historically housing from between 40 and 45 male OWI offenders; (2) a women's unit historically housing from between 18 and 25 female offenders; and

(3) a men's unit historically housing from 60 to 65 males who were not part of the OWI program.

3. On November 25, 1987, the facility issued a memo to Residential Advisors (RAs) advising them of scheduling changes. Pursuant to these changes, only female RAs would work the women's unit and one position per shift would be staffed by a female RA. (*See* Exhibit A, attached).

4. RAs serve as the security staff of the residential facility. They are involved in transporting residents, doing personal background checks, pat-down searches on residents and visitors, room searches, strip searches, administer breathalyzer and urinalysis tests, supervise the cleanliness, life, and safety features of the facility, log counts and unusual behavior, write disciplinary reports, hold disciplinary hearings, and in general enforce the rules of the facility and intervene in crises as they occur. The facility's policy was that "face-to-face" urinalysis, pat-downs, and strip searches be conducted by RAs that were the same sex as the resident.

5. Other job classifications which work at the Fort Des Moines facility are counselors, job developers, clerical staff, maintenance staff, food service workers, some educational staff, and a volunteer coordinator.

6. At the time of the scheduling change, there were 16 RAs: 11 men and 5 women.

7. Plaintiffs Tharp and Morck were RAs on the men's unit at the time of the schedule change at issue in this case. Morck worked the second shift from approximately 2:00 p.m. to 11:00 p.m. and Tharp, the third shift

from 10:00 p.m. to 6:00 a.m. Morck was the most senior RA and Tharp the second most senior RA at the time of the schedule change.

8. The women's unit shifts requiring a female staff member were as follows:

a) 6:00 a.m. to 2:00 p.m. Sunday through Thursday with Friday and Saturday off;

b) 2:00 p.m. to 10:00 p.m. Monday through Friday with Saturday and Sunday off.

c) 2:00 p.m. to 10:00 p.m. Saturday through Wednesday with Thursday and Friday off.

d) 10:00 p.m. to 6:00 a.m. Sunday through Thursday with Friday and Saturday off.

(*See* Exhibit A, attached).

9. The shifts open to both men and women were as follows:

a) 6:00 a.m. to 2:00 p.m. Friday through Sunday; 10:00 p.m. to 6:00 a.m. Monday and Tuesday with Wednesday and Thursday off.

b) 6:00 a.m. to 2:00 p.m. Monday and Tuesday; 10:00 p.m. to 6:00 a.m. Wednesday through Friday with Saturday and Sunday off.

c) 6:00 a.m. to 4:00 p.m. Monday and Tuesday; 6:00 a.m. to 2:00 p.m. Friday; 10:00 p.m. to 8:00 a.m. Saturday with Wednesday, Thursday and Sunday off.

d) 6:00 a.m. to 4:00 p.m. Friday through Sunday; 10:00 p.m. to 8:00 a.m. Monday with Tuesday, Wednesday and Thursday off.

e) 6:00 a.m. to 2:00 p.m. Monday; 2:00 p.m. to 10 p.m. Wednesday and Thursday; 4:00 p.m.

to 12:00 midnight Tuesday and Friday with Saturday and Sunday off.

f) 2:00 p.m. to 10:00 p.m. Tuesday; 6:00 a.m. to 2:00 p.m. Friday; 4:00 p.m. to 12:00 midnight Saturday, Sunday, and Monday with Wednesday and Thursday off.

g) 2:00 p.m. to 10:00 p.m. Wednesday through Sunday with Monday and Tuesday off.

h)12:00 noon to 10:00 p.m. Monday, Friday through Sunday with Tuesday through Thursday off.

i) 6:00 a.m. to 2:00 p.m. Wednesday and Thursday; 10 p.m. to 6:00 a.m. Friday through Sunday with Monday and Tuesday off.

j) 6:00 a.m. to 2:00 p.m. Wednesday and Thursday; 12:00 midnight to 8:00 a.m. Friday through Sunday with Monday and Tuesday off.

k) 6:00 a.m. to 2:00 p.m. Saturday through Monday, 10:00 p.m. to 6:00 a.m. Tuesday and Wednesday with Thursday and Friday off.

l) 6:00 a.m. to 4:00 p.m. Tuesday; 8:00 p.m. to 6:00 a.m. Wednesday through Friday with Saturday through Monday off.

(*See* Exhibit A, attached).

10. Both plaintiffs bid on the women's unit shifts at the same time of the scheduling change, but were denied because they were not women. A less senior woman was given the shift.

11. A short time after the scheduling changes were made, two men were administratively assigned to the women's unit to cover female staff members' days off.

12. The schedule was grieved by representatives of the American Federation of State and County Municipal Employees (AFSCME). The Fifth Judicial District Department of Correctional Services denied them relief. (*See* Exhibit B, attached).

13. The defendants have a collective bargaining agreement with AFSCME which governs, among other things, seniority and transfer and promotion. (*See* Exhibit C, attached).

14. The all-male OWI unit of approximately 40 residents was sometimes staffed by one woman and sometimes by one man. When RA duties required RAs that were the "same sex" as the OWI residents, and a woman was on staff for that unit at a particular time, the "same sex" duties were accomplished by having a male staff member from another unit perform those duties.

15. From the time the new shift schedule went into effect, Tharp had the opportunity to bid on 36 shift openings of various times and days. Tharp transferred to a probation and parole position in November of 1992, and no longer works at the facility. Tharp also had the opportunity to transfer to 11 probation and parole openings which would have been a promotion under the union contract.

16. Morck had 8 different shift openings at varying hours prior to his transfer to a probation and parole

officer position in May of 1989. Morck had the opportunity to transfer to probation and parole positions on 4 different occasions before he accepted one.

Respectfully submitted,

BABICH, McCONNELL & RENZO, P.C.

/s/ Anthony F. Renzo
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ATTORNEYS FOR DEFENDANTS

EXHIBIT A

FIFTH JUDICIAL DISTRICT
DEPARTMENT OF CORRECTIONAL SERVICES

[Names Omitted In Printing]

Administrative Office, 1000 Washington Ave.
Des Moines, Iowa 50314 515-286-2030

MEMORANDUM

TO: Resident Advisors

FROM: Ken Smid, Residential Manager

DATE: November 25, 1987

RE: New Schedule

Attached is a copy of the new schedule. Shift assignments will be based on senority. Give T.P. a list of several shift preferences in the order you prefer them, and he will notify you of the result. Have these to T.P. by December 5, 1987. We plan to implement the schedule January 2, 1988.

A few comments:

1. Most of the graveyard shifts include some day shifts – this is to address some of the serious communication problems that exist in the facility. This has worked well on the OWI unit. The women's graveyard shift is different so as to avoid regular double shifts due to limited numbers of staff working on the women's side.

2. There are four (4) shifts with four (4) on and Three (3) off ten (10) hour days. This was asked for by various staff.

3. I became involved with an advisory scheduling committee after it had already started. I asked the committee for changes on the existing schedule to make it

better. Instead, we got full blown different types of schedules. We tried to find the middle ground by altering the existing schedule to meet facility needs and individual input.

4. There may be 'gliches' in the schedule that could cause problems with coverage, etc. Let me know about them to see if we can make adjustments.

Administered through Polk County Board of Supervisors

Two
Re: New Schedule

I have had ongoing problems with weekend coverage of the facility. Management and job developers now work weekends. This schedule provides better weekend coverage too. There are still four shifts with both Saturday and Sunday off, and seven with either Saturday and Sunday off.

:sm

Women Side – 1 female staff – 6a.m.-2p.m. Sun., Mon., Tues., Weds., Thurs., – Off Fri. and Sat.

1 staff – 6a.m.-2p.m. Fri., Sat. & Sun. – Nights 10p.m.-6a.m. Mon. & Tues. – Off Weds. and Thurs.

1 staff – 6a.m.-2p.m. Mon. & Tues. – Nights 10p.m.-6a.m. Wed., Thurs., & Fri. – Off Sat. and Sun.

4 on 3 off – 10 hour shift

1 staff 6a.m.-4p.m. Mon. & Tues. – Off Weds., Thurs., & Sun. – 6a.m.-2p.m. Fri. – Off Weds., Thurs., and Sun. Night 10p.m.-8a.m. Saturday

4 on 3 off – 10 hour shift

1 staff 6a.m.-4a.m. Fri., Sat., Sun., 10p.m.-8a.m. Mon. Off Tues., Weds., and Thurs.

Women side – 1 female staff 2p.m.-10p.m. Mon., Tues., Weds., Thurs., & Fri. – Off Sat. & Sun.

1 staff 6a.m.-2p.m. Mon. – 2p.m.-10p.m. Weds & Thurs. – 4p.m.-12 mid. Tues. & Fri. – Off Sat. and Sun.

Women Side – 1 female staff 2p.m.-10p.m. Sat., Sun., Mon., Tues., Weds. – Off Thurs. & Fri.

1 staff 2p.m.-10p.m. Tues. – 6a.m.-2p.m. Fri. – 4p.m.-12mid. Sat., Sun., Mon. – Off Wed. and Thurs.

1 staff 2p.m.-10p.m. Weds., Thurs., Fri., Sat., & Sun. Off Mon. & Tues.

4 on 3 off – 10 hour shift

1 staff 12 noon-10p.m. Mon., Fri., Sat., & Sun. Off Tues., Weds., and Thurs.

Women Side – 1 female staff 10p.m.-6a.m. Nights Sun., Mon., Tues., Weds., & Thurs. – Off Fri. and Sat.

1 staff 6a.m.-2p.m. Weds. & Thurs. Nights 10p.m.-6a.m. Fri., Sat., & Sun. – Off Mon. and Tues.

1 staff 6a.m.-2p.m. Weds. & Thurs. Nights 12 mid-8a.m. Fri. Sat., & Sun. – Off Mon. and Tues.

1 staff 6a.m.-2p.m. Sat., Sun., Mon. Nights 10p.m.-6a.m. Tues. & Weds. Off Thurs. & Fri.

4 on 3 off – 10 hour shift

1 staff 6a.m.-4p.m. Tues. 8p.m.-6a.m. Weds., Thurs., Fri. Off Sat., Sun., Mon.

EXHIBIT B

FIFTH JUDICIAL DISTRICT
DEPARTMENT OF CORRECTIONAL SERVICES

[Names Omitted In Printing]

Administrative Office, 1000 Washington Ave.
Des Moines, Iowa 50314 515-286-2030

April 8, 1988

MEMORANDUM

To: Bill Guthrie, Field Representative Council 61

From: Jim Hancock, Fifth District Corrections

Re: Shift Bids – Women's Facility

Traditionally, the department has staffed the Women's Facility with the requirement that a woman be assigned to that side at all times. From the limited information I could gather through the National Institute of Corrections the practice of requiring a woman staff to be directly assigned to a women's unit is accepted practice.

The practice discourages a male staff from singularly being assigned to a women's unit unless teamed with a female staff member. The issue is one, of operational efficiency.

Administered through Polk County Board of Supervisors

EXHIBIT C

AGREEMENT

BETWEEN

Polk County, Iowa

and

Local 1868

American Federation of State

County and Municipal Employees

AFL-CIO

1980 - 1983

ARTICLE V

CALL TIME

Section 1 - Purpose and Eligibility

Call time is intended to compensate an employee for making a special trip to work. To qualify for call-in pay, the Employee's call time worked cannot be contiguous either before or after his/her regularly scheduled work shift.

Section 2 - Rate

A regular full-time Employee shall be guaranteed four (4) hours of call time, at the rate of one and one-half (1½) times his/her straight time hourly rate, in pay or compensatory time off.

Section 3 - Prescheduled Staff Meetings Excluded

Prescheduled staff meetings, not within the category of call time shall be at the regular time rate.

Section 4 - Professional Employees Excluded

Professional Employees shall not be paid call time premiums.

ARTICLE VI
SENIORITY

Section 1 - Definition

Seniority is the length of a regular full-time Employee's continuous service with the Employer, calculated after the expiration of the probationary period from the Employee's most recent date of hire or rehire. Seniority is accrued on a County-wide basis within the bargaining unit in which the Employee is employed. Active and continuous employment shall be used for the purpose of calculating vacation and sick leave.

Service with the County in an excluded management/supervisory position, or in a position in another bargaining unit, shall not be applied in calculating bargaining unit seniority for purposes of transfer, promotion, layoff,

and/or recall. An Employee who is transferred from an excluded management/supervisory position to a bargaining unit position in which the Employee previously accrued seniority, or an Employee who is transferred from one bargaining unit to another bargaining unit in which the Employee had previously accrued seniority, shall have his/her previous bargaining unit seniority reestablished without loss.

Seniority accrued in an excluded confidential position may be applied to bargaining unit seniority if the Employee should, at a later date, occupy a bargaining unit position, provided that the subsequent position is in the same bargaining unit that the previously held confidential position would have been placed had the position not been excluded.

Section 2 - Probationary Employees

A new Employee shall be on probation and have no seniority rights or recourse to the grievance procedure for a period of six (6) months from the date he/she commences work in a full-time position; and if retained, seniority shall be calculated from the first date of hire or rehire.

Hence forth [sic], an Employee appointed at an entry hourly rate as a temporary or extra help Employee who works an uninterrupted full (day and week) schedule (as defined in Article III of this Agreement), and who subsequently becomes appointed as a regular full-time Employee, shall have all consecutive time immediately before employment as a regular full-time Employee applied towards his/her probationary period up to a

maximum of four (4) months, provided that the time as a temporary Employee is in the same department and the same job classification to which the Employee is subsequently appointed as a regular full-time Employee and provided that the pay during the temporary employment was the entry hourly rate for said classification. Such time, up to a maximum of four (4) months, shall also apply in the calculation of seniority, vacation leave, professional leave, and entry and advancement within the pay grade, but shall not apply towards accumulation of sick leave. To receive such credit, the time worked as a temporary Employee must be full-time, uninterrupted, within the same job classification, at the entry hourly rate, and in the same department. This Section does not apply to temporary transfers and subsequent promotions of regular full-time Employees.

Section 3 - Seniority List

The Seniority list on the date of this Agreement shall show the name and job classification of all bargaining unit Employees. The Employer shall update seniority lists no less than once every ninety (90) days.

Section 4 - Loss of Seniority Rights

An employee shall lose his/her seniority rights and the employment relationship shall be broken and terminated under the following conditions:

A. Quits or retires.

B. Is discharged and the discharge is not reversed through the grievance procedure.

C. Engages in other work while on a paid leave of absence, gives a false reason for obtaining a leave of absence, or overstays a leave of absence, unless evidence satisfactory to the Employer is presented, clearly establishing that the Employee was physically unable to give notice of return.

D. Is absent for three (3) consecutive days without notice to the Employer, unless evidence satisfactory to the Employer is presented, clearly establishing that the Employee was physically unable to give such notice.

E. Fails to report ready for work at the end of a leave of absence.

F. Fails to report ready to work within five (5) calendar days after having been notified to return to work following lay off.

G. Is laid off "out the door" for period exceeding twelve (12) continuous months.

Section 5 - Retirement

Employee retirement is obligatory at age seventy (70).

Section 6 - Seniority Accrual During Unpaid Leave of Absence.

Regular full-time Employee shall accrue seniority only during the first ninety (90) days while on approved, unpaid leave. Accrual of seniority during layoff shall be only for the first thirty (30) days.

Section 7 - Resolving Conflicts in Seniority

Henceforth, where two (2) or more Employees are appointed to full-time positions in the same bargaining unit on the same day, and none has served in a part-time capacity with the County for the year immediately preceding the appointment, conflicts in seniority shall be resolved by the last four (4) digits of the Employee's Social Security number, with the Employee having the lower number being considered as having greater seniority. If any of these Employees have served in a part-time capacity during the twelve month period immediately preceding the appointment, the Employee with the greater amount of time actually served in a part-time capacity shall be considered as having the greater seniority. Part-time service in calculating seniority or any other benefit shall only be considered as it applies to this specific Section, and only when it is necessary to resolve conflicts in seniority.

ARTICLE VII

TRANSFER AND PROMOTION

Section 1 - Transfer/Promotion Procedure

A. The Employer shall have the authority to fill a vacancy or vacancies. The Employer shall not be obligated to transfer, promote, and/or hire any Employee or applicant deemed not qualified.

B. The term promotion, as used herein, means the advancement of an Employee to a higher paying job classification.

C. Whenever a true job opening occurs, other than a temporary opening, in any existing bargaining unit position, or as a result of the development or establishment of a new bargaining unit position, a notice of such opening shall be posted according to Article VII, Section 6, of the Agreement.

D. During this period, Employees who wish to apply for the vacant position, including Employees on layoff, may do so. The application shall be submitted according to Article VII, Section 2, of this Agreement.

E. If more than one (1) application for transfer, promotion, and/or hire is received for a true vacancy in a bargaining unit position, and all other qualifications such as ability, experience, training, and aptitude are substantially equal, seniority shall be considered as a distinguishing factor. Seniority consideration shall be applied to such applications in the following order:

(1) Employees on departmental recall lists in the same classification if laid off from the department in which the vacancy exists.

(2) Employees in like job classifications within the department in which the vacancy exists.

(3) Employees within the department in which the vacancy exists who desire to apply for promotion.

(4) Employees on County recall lists in the same job classification as the vacancy.

(5) Employees in like job classifications within the County.

(6) Employees within the County who desire to apply for promotion.

(7) Applicants not currently employed on a regular full-time basis with the County.

F. The Employer need not consider seniority with regard to the following applicants, and no transfer, promotion, and/or posting grievance can be forthcoming from applicants who:

(1) Are serving new hire probation.

(2) Have been transferred/promoted within the twelve (12) month period immediately before making application for another transfer/promotion.

(3) Are applying for a downward transfer.

G. If an applicant's seniority is bypassed for any reason in filling a vacant bargaining unit position, the reasons for such bypass shall be furnished in writing to the more senior Employee or Employees, at least two (2) working days prior to the appointment. This applies only to applicants identified in Section 1, Subsection E (1 through 3).

H. Pay Upon Promotion: Upon receiving a promotion, the Employee shall receive a one (1) step increase, or the pay rate commensurate with the Entry Step in the higher job classification, whichever is higher. The promotion shall be effective as of the beginning of the payroll period following Board approval of the promotion.

Section 2 - Transfer/Promotion Application

Any request for transfer/promotion shall be submitted in writing by the Employee on forms provided by the Employer.

Employees interested in a transfer/promotion to a true vacancy within the department shall, in writing, so advice their department head.

Employees interested in a transfer/promotion to a true vacancy in another County department shall, in writing, so advice the County Personnel Department.

Section 3 - Probationary Period For Transferred/Promoted Employees

If, after a reasonable lapse of time, not exceeding sixty (60) work days, the transferred/promoted Employee fails to perform satisfactorily the duties of the position to which he/she was transferred/promoted, the Employer may remove said Employee and return him/her to his/her former job and salary prior to transfer/promotion.

Employees being transferred/promoted from one County department to another County department shall serve a probationary period of one hundred and twenty (120) work days. If the Employee fails to perform satisfactorily the duties of the position to which he/she was transferred/promoted, the Employer may remove said Employee and return him/her to his/her former job and salary prior to transfer/promotion.

Section 4 - Downward Transfer

Downward transfers may be imposed by the Employer in disciplinary and/or hardship cases. In all such cases, the rate of pay shall be established by the County Director of Personnel after reviewing the reasons for downward transfer, but in no case shall the rate of pay fall below the Entry Step, nor above the Top Step of the grade of the newly assigned position.

Section 5 - Temporary Transfers

The Employer shall have the authority to temporarily transfer Employees from job to job where deemed necessary, and nothing herein shall be construed as a restriction on this authority. Such temporary transfer shall not result in a reduction of the regular pay rate of the transferred Employee, and an Employee temporarily transferred to a higher paying job classification, shall receive the Entry Step for same, or a one (1) step pay increase, whichever is higher, provided that such increase does not exceed the Top Step of said classification, and such temporary transfer extends beyond five (5) consecutive work days. Abuse of the intent of the foregoing shall be subject to the grievance procedure.

A temporary transfer shall be defined as a period of time of up to thirty (30) work days, except such transfers may be for a period of time of up to six (6) months if a vacancy is created as a result of an approved leave of absence, and may be extended beyond six (6) months if the approved leave of absence is also extended.

This Section shall apply to any Employee covered by this Agreement who is temporarily transferred into a State position of a higher classification than that which the Employee holds with the County, provided that the County Director of Personnel, based on the standards utilized by the County to rate duties and responsibilities and assign classifications and grades, determines that the State position is a higher classification.

Section 6 - Posting Procedures

A true vacancy in an existing bargaining unit position shall be posted within the department in which it exists. A true vacancy is defined as one that the Employer desires to fill. A Notice of Job Vacancy will be forwarded at the same time to the County Personnel Department for posting. This notice may be forwarded by the Personnel Department for posting in other offices. The job will be posted for seven (7) calendar days from the date of the original vacancy notice as posted in the originating department, during which time Employees may make written transfer/promotion application. All postings shall include the location of the vacancy, the hours of work (if other than the norm), and the "Requirements of Work" as contained in the latest edition of the County's Position Description Manual. It is agreed that the County Personnel Department shall have the right to establish and revise the Nature of Work, Examples of Duties, and Requirements of Work necessary for each position in the County's Position Description Manual.

Section 7 - Posting Requirements Following Successful Transfer

A true vacancy following as a consequence of a successful transfer into a vacancy shall be posted for bid.

The job vacancy following as a consequence of a successful tranfer [sic] into this second vacancy need not be posted. If the Employer chooses to fill the vacancy, he/she may do so either by transfer, or by new hire, without regard to further posting.

Supreme Court, U.S.
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No. 95-1289

In The

Supreme Court of the United States

October Term, 1995

RAY H. THARP and ROBERT C. MORCK,

Petitioners,

v.

IOWA DEPARTMENT OF CORRECTIONS AND STATE OF IOWA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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STATUTES:

42 U.S.C. § 2000e-2(e)(1) 2

STATEMENT OF THE CASE

The Respondents do not disagree with the Petitioner's Statement of the Case. Additionally, the following facts found by the Eighth Circuit are important to the consideration of this case. At the time of the November 25, 1987 shift changes, the local correctional facility employed 11 male and 6 female Residential Advisors (RAs). Under the prior shift assignment policy, there were times when no female RA was available to conduct same sex searches or urinalysis of female residents in the women's unit. Other, inadequately trained female staff would then perform these functions. To remedy this problem, and to provide positive female role models for the female inmates, the facility adopted the policy that only female RAs would be assigned to the women's unit. There are 4 shifts open only to female RAs and 12 shifts open to both male and female RAs. (Appendix 2-3). *Tharp v. Iowa Department of Corrections*, 68 F.3d 223, 224 (8th Cir. 1995). The Eighth Circuit found that the ineligibility for the women's unit shift assignment was a "minimal restriction" upon the male RAs employment. They did not suffer termination, demotion, or reduction in pay. (Appendix 7-8) *Tharp*, 68 F.3d at 226. Both were eventually promoted.

REASONS FOR DENIAL OF THE PETITION

This Case Presents No Conflict With Decisions Of This Court Or The Courts Of Appeals In Other Circuits.

This case does not conflict with the Court's decision in *International Union, UAW v. Johnson Controls*, 499 U.S.

187 (1991). The Court there found the fetal protection policy in question to be gender-based discrimination which could only be justified if the respondent could establish that sex was a bonafide occupational qualification.[1] 42 U.S.C. § 2000e-2(e)(1). 499 U.S. at 200.

By contrast the Eighth Circuit did not find the challenged policy to be gender-based discrimination prohibited by the act. The facility simply arranged job scheduling in order to ensure a female was always present to facilitate intrusive urinalysis collection, pat searches, and strip searches which involved more than an occasional or inadvertent viewing of an unclothed female by an RA. It resulted in shifts on the women's unit being open only to women, though men also filled those shifts on a relief and vacation basis. The circuit court reached this result after balancing female inmate privacy concerns, *see Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993); *Sepulveda v. Ramirez*, 967 F.2d 1413 (9th Cir. 1992) against the employment rights of correctional officers.

The Eighth Circuit in this case did the same balancing that every other circuit has done when faced with privacy interests of inmates and competing employment interests of correctional staff. *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991) (*per curiam;*) *Covino v. Patrissi*, 967 F.2d 73, 78-79 (2nd Cir. 1992); *Forts v. Ward*, 621 F.2d 1210 (2nd Cir.

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[1] Contrary to the Petitioners' claim, the Corrections Department did not seek to establish a BFOQ, except as an alternative position, though the facts would support it. *See Torres v. Wisconsin Department of Health and Social Services*, 859 F.2d 1523 (7th Cir. 1988); *Jennings v. New York State Office of Mental Health*, 977 F.2d 731 (2nd Cir. 1992) (*per curiam*).

1980); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981); *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987); *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995); *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994); *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982) (*per curiam*); *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990), *cert. denied*, 501 U.S. 1209, 111 S.Ct. 2807, 115 L.Ed.2d 979 (1991); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966, 100 S.Ct. 2942, 64 L.Ed.2d 825 (1980); *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Cumbey v. Meachum*, 684 F.2d 712 (10th Cir. 1982) (*per curiam*); *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982).

After balancing those interests, the Eighth Circuit found the impact on the two male RAs in this case to be a "minimal restriction[2] on plaintiff's employment". *Tharp*, 68 F.3d at 226. They did not suffer termination, demotion, or reduction in pay; their promotion opportunities were unaffected; and at the same time female inmates' privacy and rehabilitation interests were furthered by reassigning RAs in a manner even less restrictive than that upheld in *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990), *cert. denied*,

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[2] The loss claimed by the Plaintiffs is mere convenience. The shifts on the women's unit begin and end at times different from Petitioner's then current assignment. If the Petitioners had been given the shifts of choice on the women's unit, one would have been able to leave work in time to work at a desired second job and the other would have been able to better coordinate with his wife's work schedule and avoid child care expense. (Tr. Oral Argument in Court of Appeals).

501 U.S. 1209, 111 S.Ct. 2807, 115 L.Ed.2d 979 (1991). *Tharp*, 68 F.3d at 226. (Appendix 7-8).

Use of the balancing test does not contravene this Court's decision in *Johnson Controls*. This case follows, rather than conflicts with cases in other circuits which deal with employment opportunities and inmate privacy.

CONCLUSION

Because there is no conflict with decisions of this Court or the analysis used by other courts of appeals, the Petition should be denied.

Respectfully submitted,

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